

STATE OF MICHIGAN
COURT OF APPEALS

KATHRYN E. MACHIN,

Plaintiff-Appellee,

v

RYAN PATRICK CONKLIN,

Defendant-Appellant.

UNPUBLISHED

January 26, 2012

No. 301225

Leelanau Circuit Court

LC No. 99-4773-DP

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right the lower court's orders granting plaintiff attorney fees and costs and denying defendant's motion for reconsideration. Because we find that the trial court failed to make necessary factual findings to support its award of attorney fees, we vacate the trial court's order and remand in order for the trial court to make factual findings on the record.

Plaintiff and defendant share custody of their minor child. In April 2010, defendant filed a motion to modify custody. The trial court referred the matter to the family division referee and a hearing date was set. The trial court also issued a pretrial order outlining various documents that had to be submitted before the hearing, including a witness list and a trial brief. Defendant failed to submit any of the required documents by the deadline, and on July 23, 2010, the date of the scheduled motion hearing, defendant still had not complied with the pretrial order. Plaintiff's counsel orally moved to dismiss defendant's motion based on defendant's failure to comply with the pretrial order. The referee recommended that the motion be dismissed without prejudice. The trial court agreed with the referee's recommendation, and a conforming order dismissing the motion without prejudice was entered on July 27, 2010.

After defendant's motion was dismissed, plaintiff moved for attorney fees and costs, alleging that defendant filed a frivolous motion under MCR 2.625(A)(2) and MCL 600.2591(1). Plaintiff argued in her brief filed with the trial court that defendant's motion was frivolous because defendant knew, or with reasonable diligence would have discovered, that the allegations in the motion for change of custody were not true. At the hearing on plaintiff's motion for attorney fees, the trial court did not make any findings of fact in regard to whether defendant's motion was frivolous. Instead, the trial court focused on the fact that defendant failed to submit a witness list and trial brief, and that this omission burdened plaintiff.

The trial court awarded plaintiff \$5,000 in attorney fees. The trial court did not explain the basis for its award of attorney fees, nor did it consider whether the amount was reasonable on the record. Defendant filed a motion for reconsideration regarding the order awarding attorney fees, and the trial court denied the motion, finding that the motion presented the same issues that it previously ruled on, and that there was no palpable error.

On appeal, defendant argues that the trial court improperly assessed attorney fees because it failed to properly set forth the reasons for finding the motion was frivolous. Defendant also argues that the trial court failed to explain how it calculated the \$5,000 fee. Lastly, defendant argues that the trial court improperly denied his motion for reconsideration.

We review a trial court's decision to award attorney fees and the determination of the reasonableness of the award for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A trial court abuses its discretion when its decision falls "outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Questions of law, such as the interpretation of statutes and court rules, are reviewed de novo. *In re Temple Marital Trust*, 278 Mich App at 128. We review a trial court's factual determinations, including the determination regarding whether an action is frivolous, for clear error. *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005). "A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008).

Michigan follows the "American rule" and generally allows recovery of attorney fees only if authorized by a statute, court rule, or common-law exception. *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 37-38; 576 NW2d 641 (1998). In this case, plaintiff specifically argued that she was entitled to attorney fees pursuant to MCR 2.625(A)(2) and MCL 600.2591(1) because defendant's motion was frivolous. MCL 600.2591 provides that "if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action." The statute states that an action is "frivolous" if the primary purpose of the action was to "harass, embarrass or injure the prevailing party," or the party had "no reasonable basis to believe that the facts underlying that party's legal position were in fact true," or the party's "legal position was devoid of arguable legal merit." MCL 600.2591(3)(a)(i)-(iii). MCR 2.625(A)(2) provides that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591."

Our court rules require trial courts to place findings of fact and conclusions of law on the record. MCR 2.517(A)(1); *Morris v Clawson Tank Co*, 459 Mich 256, 274; 587 NW2d 253 (1998). Findings of fact are sufficient if they are "[b]rief, definite, and pertinent," MCR 2.517(A)(2), and "it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation," *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

In this case, the trial court did not address whether defendant's claims were frivolous or mention the court rule and statute under which plaintiff was requesting attorney fees. Further,

the parties did not offer any argument in regard to the issue of whether defendant's claims were frivolous at the hearing. Rather, the focus of the brief hearing was on defendant's failure to file the documents required by the pretrial order. At the conclusion of the discussion regarding how defendant's failure to file the required documents prejudiced plaintiff, the trial court noted that plaintiff will now have to "get reorganized, rearrange the witnesses, prepare" for the hearing a second time. Accordingly, it does not appear that the trial court was aware of the issues in the case, and further explanation is necessary for appellate review. *Id.* Further, because the trial court also failed to make any factual findings in regard to the propriety of awarding attorney fees, we cannot determine whether an award of attorney fees was clearly erroneous. Factual findings in compliance with the court rules are "necessary to proper appellate review." *Morris*, 459 Mich at 274. Consequently, we conclude that the trial court's failure to place any findings of fact on the record in regard to whether defendant's motion was frivolous and requires that we vacate the trial court's order and remand this case to the trial court for factual findings.¹

In light of our resolution of these issues, we need not consider defendant's other argument on appeal regarding the trial court's denial of his motion for reconsideration.

We vacate the trial court's order and remand for the trial court to make findings of fact regarding whether plaintiff's motion was frivolous. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello

¹ In the event that the trial court concludes that defendant's motion was frivolous and attorney fees are proper, we note that its statement that "\$5,000 is not an unreasonable sum" is not a sufficient factual finding to support a determination that an attorney fee award is reasonable. Every award of attorney fees must be reasonable, and the trial court should calculate a reasonable attorney fee based on the factors set forth in Rule 1.5(a) of the Michigan Rules of Professional Conduct, *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), and *Khoury*, 481 Mich at 530-531.